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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

CESAR E. ALVAREZ and ANA I. ALVAREZ,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Cesar E. Alvarez and Ana I. Alvarez, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 1, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, and of the District Court for the Southern District of Florida appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 1, 1970. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether confiscation by the Cuban government of rental property used in trade or business in return for unsecured monthly indemnification payments, which are paid and received until a subsequent divesting enactment, constitutes a taxable loss of the underlying rental property in the year in which the right to receive indemnification payments is extinguished.

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 26

§ 165. Losses

(a) General Rule. — There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

• • •

(c) Limitation on losses of individuals. — In the case of an individual, the deduction under subsection (a) shall be limited to —

(1) Losses incurred in a trade of business . . .

2. Code of Federal Regulations, Title 26

§ 1.165-1(d). Year of deduction.

(2)(i) If a casualty or other event occurs which may result in a loss and in the year of such casualty or event, there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained, for purposes of Section 165, until it can be ascertained with reasonable certainty whether or not such reimbursement will be received . . .

STATEMENT OF THE CASE

Cesar and Ana Alvarez, as husband and wife, filed income tax returns for the years 1961, 1962, and 1963. In 1964 and 1966 they filed claims for refund asserting over-payments for the taxable years 1962 and 1963. These claims were disallowed by the Commissioner of Internal Revenue.

After exhausting the administrative remedies available to them, Mr. and Mrs. Alvarez successfully brought suit for the recovery of the taxes paid in the United States District Court for the Southern District of Florida, under the provisions of 28 U.S.C. § 1346. Judgment was entered for Mr. and Mrs. Alvarez on July 10, 1969. The Circuit Court of Appeals for the Fifth Circuit reversed in an opinion in direct conflict with the opinion of the United States District Court for the Northern District of Illinois in the consolidated cases of *Beltran v. United States* and *Onetti v. United States*, reported at 69-2 USTC ¶ 9649, appeal pending, United States Court of Appeals for the Seventh Circuit. An appeal from a Tax Court decision (*Luis and Alicia P. Bosch v. Commissioner*, CCH T.C.M. 1970-66) of a very similar Cuban confiscation case is pending in the Fifth Circuit Court of Appeals.

The Fifth Circuit opinion in the instant case itself clearly invites guidance from the Supreme Court; the Circuit Court carefully drew attention to the fact that its decision was directly contrary to the result reached in another Federal court.

Moreover, the far-reaching significance of its departure from established tax law doctrine, as well as the

serious conflict it has produced in judicial treatment of Cuban loss cases, makes the Fifth Circuit decision unusually appropriate for Supreme Court review. The tax treatment of Cuban expropriation losses in itself is an issue of significance. However of much greater importance is the impact of the Fifth Circuit's decision upon all tax loss cases in which there is a claim for reimbursement — a very common situation.

Prior to June 6, 1961, Cesar Alvarez was a Cuban national residing in Cuba. He owned improved business property in Camaguey, Cuba, which was rented to several tenants for commercial purposes.

On October 14, 1960, the revolutionary government of Cuba enacted the Urban Reform Law. This enactment outlawed and declared null and void all contracts for the renting of urban property, and provided a means by which the tenants could "purchase" the premises at a fixed price to be paid in monthly installments.

Under the specific provisions of the Urban Reform Law, Provisional Urban Reform Councils authorized contracts of sale with installment payments of the sales price computed by means of a formula based on the age of the buildings involved. The tenant paid the government, and the government paid the former owner.

Mr. Alvarez received installment obligations totaling $22,400 for his share of the improved business property, payable $200. per month for a period of nine years and four months. The only requirement for receiving indemnification payments was the making of a declaration of ownership. Mr. Alvarez made the necessary declaration

and monthly indemnification payments were made to his order. These payment checks were delivered to his bank in Cuba, where between October 14, 1960 and June 6, 1961, the checks were picked up and cashed.

Because of the unstable political situation in Cuba, Mr. Alvarez left that country and came to the United States to join his family on June 6, 1961. He became a resident alien on July 6, 1961, thus making his income taxable in the same manner as a citizen of the United States. Even after leaving Cuba, installment payments for the purchase of his rental property were made to his order, delivered to Mr. Alvarez' bank in Cuba, and were available to him in Cuba.

On December 5, 1961, the Cuban government enacted Law No. 989, which confiscated all assets left in Cuba by those who did not return within a stated period. Mr. Alvarez did not return and whatever property rights he then had in Cuba were confiscated.

When Mr. Alvarez departed Cuba for the United States in June of 1961, he did not forfeit any rights that the Urban Reform Law granted to him in exchange for his confiscated property. He retained the title to the property, as well as the right to receive installment payments on the purchase price. This claim for reimbursement subsisted until December 5, 1961, when it was included within the purview of the Cuban confiscation law of that date.

In his Findings of Fact and Conclusions of Law, the trial judge determined that Mr. and Mrs. Alvarez were entitled to a loss deduction under Section 165 of the Internal Revenue Code because they had proven by a pre-

ponderance of evidence that they owned the property for which the loss was claimed; that they did not sustain the loss on the property at or before the time of their departure from Cuba on June 6, 1961; that they were resident aliens of the United States at the time the loss occurred on December 5, 1961, when their right to indemnification for their property was taken; that the character of the loss took on the nature and character of the asset from which the right to indemnification arose; that the expropriated property was property used in trade or business; and that Mr. and Mrs. Alvarez were entitled to a business loss which could be carried back and carried forward as a net operating loss in accordance with the provisions of the Internal Revenue Code, Sections 165, 172 and 1231. Final Judgment was thereafter entered on July 10, 1969, by which Cesar Alvarez and Ana Alvarez recovered from the United States of America sums paid as taxes for the calendar years 1962 and 1963.

The United States Court of Appeals for the Fifth Circuit reversed the trial court, holding in effect that that which was confiscated on December 5, 1961, was an indemnification right, a nonbusiness capital asset, unrelated to the business property for which it had been received. Under the applicable Code provisions, such a loss would be deductible, if at all, in 1961, and could not be carried forward to the years 1962 and 1963.

The opinion of the Circuit Court of Appeals for the Fifth Circuit, unsupported by citation to authority, concludes that to characterize the loss which was sustained by Alvarez as a trade or business loss " . . . is not the better view."

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND FAR REACHING PROBLEMS CONCERNING EFFECTIVE ADMINISTRATION OF THE TAX LAW.

The Fifth Circuit's opinion in this case is not only of great importance to the large number of Cubans who have established residence in the United States and who have made claims similar to those involved herein, but the implications of the decision extend far beyond the field of foreign expropriation losses. This decision cuts across the entire spectrum of business activity, and basically affects any situation involving the timing and characterization for Federal income tax purposes of a partially or fully compensable loss. The doctrine set forth by the Fifth Circuit purports to transform a business asset into a non-business asset where a claim for compensation comes into existence. Such a doctrine would necessarily be applicable in any case where a compensation claim is ultimately rejected. It would deny a tax deduction for a trade or business loss, and preclude applying such a loss to income earned in subsequent years, both of which tax practices are otherwise allowable under the Code and regulations. To permit the decision of the Fifth Circuit to stand would be to permit a novel and disruptive development in the law of income taxation without the slightest support in reason, the Internal Revenue Code, case law, or administrative ruling. For these reasons the decision of the Fifth Circuit in this case presents questions whose resolution will have immediate importance far beyond the particular facts and parties involved.

2. THE ISSUE INVOLVED IN THE DECISION BELOW IS INVOLVED IN OTHER CASES PENDING IN LOWER COURTS AND IN INNUMERABLE ADMINISTRATIVE PROCEEDINGS, THEREBY MAKING A DEFINITIVE RULING BY THIS COURT DESIRABLE.

The Fifth Circuit's opinion in this case recognizes that there are decisions by other courts involving questions similar to those presented, including cases in which it has been held that losses similar to those sustained by Mr. Alvarez were trade or business losses. One of the cases mentioned is presently pending before the Fifth Circuit Court of Appeals, and another is presently pending before the Court of Appeals for the Seventh Circuit. In addition, the decision rendered below is obviously an important decision involving many individuals who will be making claims for Cuban expropriation losses as well as others claiming losses where a claim for reimbursement has been extinguished.

3. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS AS TO THE PROPER INTERPRETATION OF SECTION 165 OF THE INTERNAL REVENUE CODE, AS WELL AS THE CONTROLLING ADMINISTRATIVE REGULATIONS PROMULGATED BY THE ADMINISTRATIVE AGENCY CHARGED WITH ITS ENFORCEMENT.

While the holding of the Fifth Circuit in this case does not presently conflict with that of another Court of Appeals, it is in direct conflict with the 1969 decision of the United States District Court for the Northern District of Illinois in the consolidated cases of *Beltran v. United States of America* and *Onetti v. United States of America*, supra, appeal pending, United States Court of Appeals for the Seventh Circuit. Furthermore, the decision rendered below is in direct conflict with Section 1.165-1(d)(2)(i) of the Code of Federal Regulations, 26 C.F.R. § 1.165-1, which specifically states that a loss arising out of the destruction or taking of property, where a right of reimbursement comes into being at the time of such destruction or taking, is sustained for tax purposes when and only when it is determined with reasonable certainty that the claim for reimbursement will not be satisfied.

This regulation has been approved by numerous decisions of the United States Tax Court, in particular that of *Harry J. Colish*, 48 T.C. 711 (1967). By divorcing the trade or business attribute of the confiscated property from the right of indemnification received in its place, the decision of the Fifth Circuit is so inconsistent in theory with the provisions of the applicable Treasury Regulation as to leave its intent and meaning in a complete state of confusion.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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